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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 307

THE CLARK ESTATE COMPANY, a Corporation,
Petitioner,

vs.

ALONZO H. GENTRY, COMMERCE TRUST COMPANY, a Corporation, ESTHER REYBURN and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, CO-EXECUTRIX AND CO-EXECUTOR OF THE ESTATE OF ROSCOE REYBURN, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI, AND BRIEF IN SUPPORT THEREOF.

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ALONZO H. GENTRY, COMMERCE TRUST COMPANY, a Corporation, ESTHER REYBURN and THE FIRST NATIONAL BANK OF KANSAS CITY, MISSOURI, CO-EXECUTRIX AND CO-EXECUTOR OF THE ESTATE OF ROSCOE REYBURN, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

Your Petitioner, The Clark Estate Company, a Corporation, respectfully files this Petition for a Writ of Certiorari directed to the Supreme Court of the State of Missouri, Division No. 1, to review the case of *The Clark Estate Company, a Corporation,* v. *Alonzo H. Gentry, Commerce Trust Company, a Corporation, Esther Reyburn and The First National Bank of Kansas City, Missouri, Co-Executrix and Co-Executor of the Estate of Roscoe Reyburn, Deceased,* and respectfully show that:

I.

STATEMENT OF MATTERS INVOLVED.

(a) Summary of Legal Question Presented.

The case presents no controverted issues of fact and only a single question of law is involved, to-wit:

In an action in tort to recover damages against defendants for defrauding a corporation of all of its property, and which had been filed by the Corporation after its Charter had been forfeited by the Secretary of State, for failure to file reports and pay taxes, *is the petition subject to amendment, without departure,* substituting as plaintiff the real party in interest, having authority to prosecute the action, or does the statute of limitations continue to run and bar the cause of action while the suit is pending, untried in the trial court, notwithstanding *no abatement has ever been had* and the real party in interest is now in the case by the filing of an amended petition in the cause by the Corporation after the forfeiture of its Charter had been rescinded and the Corporation restored in good standing?

It is petitioners contention that the right to so amend is the settled and established law of Missouri, and that the Missouri Supreme Court cannot ignore the settled and established rulings of the common law courts uniformly applied in Missouri and in practically every state in the Union, and arbitrarily deny petitioner a remedy for relief to which it is entitled under settled principles of law, and arbitrarily announce a new holding contrary to all said prior decisions and without support of a single precedent anywhere, without violating the due process clause in Section 1 of the Fourteenth Amendment to the Constitution of the United States providing

"Nor shall any state deprive any person of life, liberty or property, without due process of law."

(b) Summary Statement of Case.

On March 6th, 1930, The Clark Estate Company, a Corporation, Petitioner herein, filed a suit in the Circuit Court of Jackson County, Missouri, alleging a chain of wrongful and concerted acts of defendants, provoking a foreclosure sale of plaintiff's property, and charging the acts were done, pursuant to a conspiracy and resulted in damage to plaintiff. The complaint pleaded actionable facts alleging the resulting damage to be the foreclosure and loss to plaintiff of all its property. The original suit was filed before the loss had fully accrued. This suit was filed March 6, 1930, (Tr. 12, 17) but the property was not foreclosed until December 18, 1930, with the alleged loss to plaintiff amounting to One Million Dollars.

After the foreclosure amended petitions were filed properly pleading the foreclosure and loss, (Tr. 56-67), (Tr. 67-79).

On January 1, 1927, the Corporate Charter of plaintiff had been forfeited by the Secretary of State of the State of Missouri under authority of Section 9813 R. S. Mo. 1919, reading as follows:

> "If any corporation shall fail to comply with the provisions of this article, on or before the thirty-first day of December, the corporate rights and privileges of such corporation shall be forfeited, and the secretary of state shall thereupon cancel the certificate, or license, of such corporation by appropriation entry on the margin of the record thereof, whereupon all the powers, privileges and franchises conferred upon such corporation by such certificate, or license, shall subject to rescission as in this article provided, cease

and determine, and the secretary of state shall notify such corporation by mail, addressed to its postoffice address, as disclosed by the records of his office, that its corporate existence and rights in this state have been forfeited and canceled, and the corporation dissolved, subject to rescission as in this article provided."

Because of said Forfeiture, The Clark Estate Company had been a defunct corporation, without a corporate charter at the time of the judicial sale of its property December 18, 1930, and at the time of the institution March 6, 1930, of said tort action to recover damages for the fraudulent conspiracy causing the loss of its property. The fact that its Corporate charter had been forfeited was pleaded by defendants, but nothing was done in the trial court to abate the suit, and in 1946, petitioners corporate charter was restored and its forfeiture rescinded, and the corporation was reinstated in good standing under the power vested in the Secretary of State of Missouri by Section 120, Laws of 1943, p. 472, reading as follows:

"The Secretary of state may rescind the forfeiture of the corporate rights of any corporation, declared under the provisions of Sec. 18 of this Act, upon presentation of an affidavit signed by the president, a vice-president, secretary or treasurer, of such corporation, setting forth that such corporation has not suspended its ordinary and lawful business within one year next before the filing of such affidavit, or that the corporation, at the time of the forfeiture was declared, held title, or transferable interest, in real estate. The secretary of state may demand such other and further proof as he may deem necessary before rescinding any such forfeiture. For rescinding such forfeiture there shall be paid to the state a fee of fifty dollars; provided, no such forfeiture shall be rescinded after one year from the date of its entry for less than the fees required by law for original corporation."

After the forfeiture the right to maintain suits on behalf of the corporation was vested in its last Board of Directors by Section 4622 R. S. Mo. 1929 (Section 5094 R. S. Mo. 1939, Sec. 118, Session Laws 1943, page 472), reading as follows:

> "When the forfeiture of the certificate, or license, of any corporation has been declared, the officers and directors or the manager, or managers, of the affairs of said corporation, at the time such forfeiture is declared, by whatever name they may be known in law, shall be trustees of such corporation with full power to settle its affairs and distribute its assets among its stockholders; after paying the debts due and owing by such corporation; and as such trustees to sue and recover debts and property due such corporation, and they shall be jointly and severally responsible to the creditors and stockholders of such corporations to the extent of its property and assets that may properly come into their hands."

By Section 4629 R. S. Mo. 1929 (Sec. 5101 R. S. Mo. 1939, Sec. 126, Session Laws 1943, page 474), the corporate entity was prohibited from maintaining certain specifically named kind of suits. This Section reads as follows:

> "No corporation shall maintain an action in any court of this state for the collection of bills or accounts payable or for the enforcement of a contract, made while such corporation is in suspension, or after the forfeiture of its certificate, or license, under the provisions of this article, unless it shall have first been reinstated, or the forfeiture entered against it rescinded as in this article provided."

After the corporate charter was restored in 1946, amended petitions were filed while the corporation was in good standing, including the fourth amended petition filed August 30, 1950, and appearing at pages 2 to 20, of the Transcript herein, and by reference said fourth amended petition is made a part hereof.

On September 22, 1948, the defendants First National Bank and Esther Reyburn, Co-executor and Co-executrix, aforesaid, filed a motion (Tr. 98) to dismiss the suit because the charter of The Clark Estate Company had been forfeited and the action was barred by the statute of limitations before the charter was restored. That motion was directed to plaintiff's amended petition then pending, and the same was overruled by the trial court on October 4, 1948 (Tr. 99). On August 30, 1950, the aforesaid defendants filed the same kind of motion directed to plaintiff's fourth amended petition, and on September 6th, 1950, defendant Alonzo H. Gentry and defendant Commerce Trust Company filed separate motions to dismiss plaintiff's fourth amended petition, because plaintiff's charter had been forfeited January 1, 1927, and the pending suit had become barred by limitation before the forfeiture was rescinded January 17, 1946 (See Motions, Tr. 22, 25, 26).

These separate motions were sustained by the trial court (Tr. 100), and the rulings thereon were duly appealed to the Supreme Court of Missouri.

The Missouri Supreme Court affirmed the holding of the trial court and held that the cause of action was barred by the operation of the statute of limitations while the suit was pending untried in the trial court. The opinion of the Supreme Court of Missouri appears in the Abstract filed herein beginning on page 105 thereof, and by reference same is made a part hereof. The opinion was rendered by said Court, May 14, 1951, and appears in 240 S. W. (2d) 124.

The petitioner herein filed in said Supreme Court of Missouri a motion to transfer said appealed cause to the Supreme Court of Missouri *in Banc,* and a motion for

rehearing, same appearing on page 117 of the Abstract of Record herein, and which by reference is made a part hereof, and in which petitioner herein pleaded the violation by the Supreme Court of Missouri of the due process clause of Section I, of the Fourteenth Amendment to the Constitution of the United States cited and quoted in full in said motion for rehearing and to transfer, and pleaded that said opinion was an arbitrary departure from the settled and established law, and was contrary to, and overruled all the settled, established and controlling decisions of the common law courts, including all the decisions upon the question by the courts of Missouri, and that same is without the support of a single precedent or decision of any court where the enlightened principles of the common law are administered, and applied, and the refusal of relief to the petitioner by the said Supreme Court of Missouri amounted to an arbitary denial to this petitioner of due process of law guaranteed petitioner by Section I, of the said Fourteenth Amendment to the Constitution of the United States. The Supreme Court denied said Motion June 11, 1951, without opinion and petitioner files this petition within 90 days thereafter.

Substantiality of the Questions Involved.

Inasmuch as this case involves the question as to whether or not the courts of Missouri may, by procedural means, not according to the settled course of judicial procedure, so construe the law as to transgress the due process clause of the Fourteenth Amendment, and thereby deprive petitioner of its substantial rights under the Federal Constitution to equality of treatment, and as diligent search has failed to find any case where a claimed violation under similar circumstances has been decided, it is believed that the questions in this case are sub-

stantial. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 647, 50 S. Ct. 451, 74 L. Ed. 1107, *State of Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313, 50 S. Ct. 326, 74 L. Ed. 870, *Zucht* v. *King,* 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194.

Basis of Jurisdiction.

The case of *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 50 Sup. Ct. 451, 74 Law Ed. is believed to sustain the jurisdiction of this Court in this proceeding.

Jurisdistion of this proceeding is vested in this Court by paragraph 3 of Section 1257 of Title 28, U.S.C.A., Act June 25, 1948, C 646, 62 Stat. 929. Vesting jurisdiction in this Court in all cases,

> "where a title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States".

The denial to petitioner of due process of law in violation of Section I of the Fourteenth Amendment to the United State Constitution was specially raised and pleaded in the motion for rehearing filed by petitioner in the Supreme Court (Tr. 117), and the following question is presented to this Court.

Question Presented.

Can the Supreme Court of Missouri, consistent with the due process clause of the Fourteenth Amendment to the United States Constitution, apply one rule of law in all its prior decisions and then arbitrarily apply another and different rule of law in another case where exactly the same question is presented and decided?

Can the Missouri Supreme Court, without violating said due process clause, arbitrarily make new laws and decide any case contrary to the settled and established rulings of the common law courts theretofore uniformly applied in Missouri in all the previous cases where the same question is decided, and also uniformly applied in practically every state in the Union, and announce a new holding contrary to said prior decisions and without the support of a single precedent anywhere by any Court where the enlightened principles of the common law are administered and applied?

Reasons Relied Upon for Allowance of the Writ.

The due process clause of the Fourteenth Amendment confers upon the United States Supreme Court a very wide and extensive jurisdiction, power and duty, the supreme importance of which is to secure to the people the continuous integrity of the American Courts and is treated in a short Preface to the Argument in the Brief filed herewith.

The Writ should be issued in this case because the decision of the Missouri Supreme Court arbitrarily denies petitioner a remedy amounting to a denial of due process of law guaranteed under Section I of the Fourteenth Amendment to the Constitution of the United States for the following reasons:

1. Because the opinion of the Missouri Supreme Court arbitrarily applies a new rule of law in petitioner's case and denies petitioner a remedy in holding that the statute of limitations continued to run after this suit was filed and barred the cause of action while the suit was pending untried in the trial court, notwithstanding the fact

that there was never any abatement of the suit in the trial court, and notwithstanding the fact that all the prior Missouri decisions deciding the question involved herein, as well as the applicable statutory code of Civil Procedure of Missouri, authorized the filing of an amended petition, without a departure, substituting the real party in interest having the right to prosecute the suit, as the plaintiff, instead of the corporation whose charter had been forfeited. The said decision of the Missouri Supreme Court is without a precedent of any decision of any common law court to support it, and is directly contrary to all the decisions determining the same question, in every case previously decided in Missouri, and by the common law courts in practically every state in the Union. The following prior decisions of the Missouri courts, and the Courts of other states, are all contrary to and directly impugn and conflict with the decision of the Missouri Supreme Court complained of herein, to-wit:

Lilly v. *Tobbein,* 103 Mo. 477, 15 S.W. 618.

Hackett v. *Van Frank,* 119 Mo. App. 648, 96 S.W. 247.

Turner v. *Noble,* 211 Mo. App. 656, 249 S.W. 10[illegible].

Wilson Motor Company v. *Hoover,* 222 Mo. App. 570, 293 S.W. 61.

Enlinbey v. *Quick Payment Old Line Life Ins. Co.,* (Mo. App.), 261 S.W. 725.

Syz v. *Milk Wagon Drivers Union,* 24 S.W. 2d 1080.

Craig v. *Metropolitan Life Ins. Co.,* 296 S.W. 209, 220 Mo. App. 913.

Hutcherson v. *Thompson,* 343 Mo. 884, 123 S.W. (2d) 142.

Walker v. *Wabash Railroad Co.,* 193 Mo. 453, 92 S.W. 83.

Berger v. *Meara,* 351 Mo. 64, 171 S.W. (2d) 650 (cites *Lilly* v. *Tobein*).

M. K. & T. Ry. Co. v. *Wulf,* 226 U. S. 570, 33 S. Ct. 135, 57 L. Ed. 355.

Jensen v. *Wilson Township,* 346 Mo. 1199, 145 S.W. (2d) 372.

Mann v. *Bank of Greenfield,* 323 Mo. 1000, 20 S.W. (2d) 502.

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Laird v. *Pan American Lumber Co.,* (Mo. App.) 237 S.W. 1047.

Baron G. Collier, Inc. v. *American Cafeteria,* 256 S.W. 118, 119, 215 Mo. App. 182.

J. B. Wolfe, Inc. v. *Salkind,* 70 Atl. (2d) 72, 76, 3 N. J. 312.

Dominion Oil Co. v. *Lamb* (*Col. Sup. Ct. en Banc*), (1949), 201 Pac. (2d) 372.

Jarvis v. *Chapman Properties, Inc.,* 147 So. 860, 110 Fla. 17.

Karnes v. *Flint,* 279 Pac. 728, 731, 153 Wash. 225.

Watts v. *Liberty Royalties Corp.,* 106 Fed. (2d) 941, 943, (C.C.A. Okla.).

Ferguson Fruit Co. v. *Godding,* 258 Pac. 557, 559, 44 Idaho 76.

Beller and Campbell Supply Co. v. *Warren,* 100 Pac. (2d) 700, 157 Kans. 755.

Mass Lubricant Corp. v. *Socony-Vacuum Oil Co.,* 25 N.E. (2d) 719, 305 Mass. 269.

McKee v. *Standard Minerals Corp.,* 156 At. 193, 18 Del. Ch. 97.

Federal Crude Oil Co. v. *Yount-Lee Oil Co.,* 52 S.W. 2d 56, 61, 122 Tex. 21.

Real Estate Land Title and Trust Co. v. *Dildy,* (Tex. Civ. App.) 92 S.W. (2d) 318, 322.

McClung v. *Hill,* 96 Fed. (2d) 236 (1).

Hall v. *Citizens Bank* (Calif.), 128 Pac. (2d) 545, (Syl. 1).

Kehrlein-Swinterton Const. Co. v. *Rapken,* 30 Cal. App. 11, 156 Pac. 972.

Maryland Cas. Co. v. *Superior Court of San Francisco,* 91 Cal. App. 356, 267 Pac. 169.

Amendment Statutes, Secs. 819, 820, 822, 823, 825 R. S. Mo. 1929, Secs. 971, 972, 974, 975, 977 R. S. Mo. 1939, now Secs. 507.30, 507.50, 509.490, R. S. Mo. 1949.

The controlling effect of the foregoing cases is treated in the brief under the Argument, Point (1) p. 21 thereof.

2. Because the opinion of the Missouri Supreme Court complained of herein is contrary to and in violation of a valid statute of the State of Missouri, to-wit: Section 4621 R. S. Mo. 1929, now Section 351.540 R. S. Mo. 1949. See Argument and Authorities cited in the brief under Point (2) p. 32 thereof (Argument).

3. Because the opinion of the Missouri Supreme Court complained of herein is contrary to and in violation of Section 4629 R. S. Mo. 1929, and amounts to the judicial enactment of a statute, in direct conflict with a valid statute enacted by the Missouri legislature. See Argument and authorities cited in the brief under Point (3) p. 36 thereof.

4. Because the opinion of the Missouri Supreme Court complained of herein is contrary to the prior established law and controlling decisions in Missouri that the existence of a private corporation is not subject to attack by private litigants in a collateral proceeding, but can only

be inquired into by the State in a direct proceeding by *quo warranto*. At the time of the filing of defendants' motions to dismiss plaintiff's cause of action, and at the time said motions were sustained, the corporation had been restored in good standing and its corporate existence was recognized by the State, and therefore its existence as a corporation was not subject to attack by private litigants. This was the settled law of Missouri, as held in the following cases:

Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S.W. 74 (14).

Laird v. *Pan American Lumber Co.*, (Mo. App.) 237 S.W. 1047.

See Argument and Authorities cited under Point 4 of the Brief filed herewith, p. 38.

5. Because the Supreme Court of Missouri has decided a Federal question of substance not heretofore determined by this court and in a way probably not in accord with applicable decisions of the court.

Prayer.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued under the Seal of this Court, directed to Division 1, of the Supreme Court of the State of Missouri, commanding that Court to certify and send to this Court for its review and determination, on a day certain therein named, a full and complete Transcript of the Record and proceedings in the case of *The Clark Estate Company, a Corporation, Appellant,* vs. *Alonzo H. Gentry, Commerce Trust Company, a Corporation, Esther Reyburn, and the First National Bank of Kansas City, Missouri, Co-Executrix and Co-Executor of the Estate of Roscoe Reyburn, Deceased, Respondents,* No.

42,284 in said Missouri Supreme Court, to the end that said cause may be reviewed and determined by this Court, as provided for in the Statutes of the United States, and that said Decree and Judgment of said Missouri Supreme Court may be reversed by this Honorable Court, and this cause be ordered remanded to the trial court for further proceedings, trial and hearing on the merits, according to law, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

CLARENCE C. CHILCOTT,
Attorney for Petitioner.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Supreme Court of the State of Missouri in *The Clark Estate Company, a Corporation, Appellant*, vs. *Alonzo H. Gentry, et al., Respondents*, No. 42284 in said Court, was rendered May 14, 1951, and is reported in 240 S.W. (2d) page 124, and said Opinion appears in the Abstract of Record filed herein, pages 105-116. Petition for rehearing or in the alternative to

transfer to the court *en banc* was filed May 29, 1951 (R. 117) and was denied June 11, 1951 (R. 120), without opinion.

Statement of the Case.

The facts of this case set out in the statement of matters involved in the Petition for the Writ herein are sufficient for all purposes, and by reference same are made a part hereof.

Only a single question of law is involved, to-wit:

> Whether at the time the Supreme Court of Missouri rendered the decision herein it was the settled and established law of Missouri that without a departure an amended petition could be filed substituting as plaintiff in the case pending in the trial court the real party in interest having the right to prosecute the action.

All the prior Missouri cases in point sustain the right to amend without a departure in such a case.

The only authorities cited to support the contrary opinion of the Missouri Supreme Court complained of herein are all cases where the corporation, whose charter had been forfeited, had never been restored, the forfeiture never rescinded, and the corporation never been reinstated as a corporation in good standing. In such cases, of course, the corporation prosecuting the suit had no powers as a corporation and the suit had no legal existence as a law suit. In that kind of a case, where the real party in interest with legal power to prosecute the suit has never appeared or asked leave to file an amended petition substituting such real plaintiff for the defunct corporation, the necessary holding of the court that there was no plaintiff in the case, and therefore no action in court, could have no bearing whatever upon the question

involved here, of whether an amended petition could be filed, without a departure, substituting as plaintiff a real party authorized to prosecute the action.

Cases where the forfeiture of the corporation's Charter had never been rescinded or where no statutory trustee or other party authorized to prosecute the action had ever appeared and no request had ever been made for leave to amend, are cases that have nothing to do with the question of whether if, such real party appeared and asked leave to amend, such an amendment was permissible without a departure. That is the sole question here and there is not a decision in any common law court anywhere to support the holding made by the Missouri Supreme Court in the decision complained of herein; but, as hereinafter cited, there are numerous cases directly in point sustaining the right to amend.

Errors Relied Upon.

The Missouri Supreme Court erred in affirming the order of the trial court dismissing petitioner's cause of action on the ground that petitioner's charter, as a corporation, had been forfeited January 1, 1927, and that while its charter was forfeited, it filed the suit March 6, 1930, that the forfeiture of its corporate charter was rescinded January 17, 1946, before any abatement of the suit was ever had, and that after the corporation was reinstated in good standing it filed amended pleadings in the trial court pleading the same cause of action, and that the statute of limitations was not tolled and barring the cause of action while the suit was pending untried in the trial court.

This is an arbitrary holding without the support of any prior Missouri decision, is contrary to the settled

and established law of Missouri declared in all the prior decisions where the question involved is determined by the courts of Missouri, and said decision denies petitioner a remedy depriving it of due process of law contrary to Section 1 of the Fourteenth Amendment to the United States Constitution. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 50 Sup. Ct. 451, 74 L. Ed. 1107.

Summary of Argument.

The right of amendment without departure or change of cause of action has been recognized in Missouri for many years. Secs. 819, 820, 822, 823, 825 R. S. Mo. 1929, Secs. 971, 972, 974, 975, 977, R. S. Mo. 1939; Secs. 507.30, 507.50, 509.490, R. S. Mo. 1949.

The cases of the Supreme Court of Missouri sustaining petitioner's right to amend herein are neither distinguished nor overruled, and the Supreme Court of Missouri thereby in this case distinguished between litigants and applied a new and different principle not previously authorized or followed in deciding petitioner's cause, and thereby deprived petitioner of due process of law in protecting its rights in violation of the due process clause of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

Preface.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This clause vests in the United States Supreme Court a duty of supreme importance, which is vital to the maintenance of the integrity of the state courts. The record shows that many times in many countries governments have become corrupt and materialistic and courts have sold their opinions to the highest bidder. The function of this court under this provision of the United States Constitution is of prime importance in this materialistic age. Suppose a state court becomes corrupt and sells opinions to the highest bidder and decides a case directly contrary to the settled and established law of the state and denies a particular litigant relief upon the unheard of proposition that his action is barred by the statute of limitations while his suit is pending thereby distinguishing between litigants presenting identical principles of law. No such holding has ever been made in any case in that jurisdiction, but all adjudicated cases upon the question hold that the statute of limitations is tolled by the filing of the suit. Is it necessary to make positive proof of the concealed and hidden evidence of corruption before relief can be had? That certainly is not required by this Fourteenth Amendment to the United States Constitution. It does not limit relief for the denial of due process for any specified reason; but prohibits

denial of due process of law for any reason whatever. The state courts cannot apply one rule of law and deny relief in one case and apply a different rule of law and grant relief in all other like cases, involving the same legal proposition. Suppose a state court by some novel method of appointment of judges falls under the influence and control of corrupt persons and renders decisions according to the influence of particular litigants. A litigant with power and influence can avoid a trial of a case against it for years and then secure from a dominated court a decision that the long pending action has become barred by the statute of limitations while it was so pending in the trial court, untried. Under the Fourteenth Amendment such a decision would be at the farthest extremity from due process of law and certainly it would not be necessary to prove, as a prerequisite to relief, that the decision was procured by corrupt influence, the evidence of which would be hidden and concealed. If the decision is a departure from the settled and established ruling of the state courts, and is based upon new and unheard of principles of law, never before recognized in that jurisdiction, then it can not be due process of law.

We submit that it must be a vital duty of this Honorable Court to maintain the integrity of the state courts and see to it that every litigant is accorded due process of law, that his legal rights are duly protected and that he has redress for his grievances in accordance with the settled law of the land.

The record in this case shows that the opinion of the Missouri Supreme Court complained of rules the case contrary to all the settled and established law of Missouri, and the fact that the Missouri Supreme Court innocently and honestly made such a ruling gives it no logical merit or legal verity.

The opinion of the Missouri Supreme Court complained of herein is arbitrary and erroneous and denies petitioner due process of law for the following reasons:

(1) Because it has no authority to support it and is contrary to all the settled and established law of Missouri declared in all the prior decisions where the question involved is determined by the Court of Missouri.

Among the said prior decisions which clearly affirm as the law of Missouri the rule that an amended petition can be filed, without a departure, substituting for the corporation whose charter has been forfeited a plaintiff who is the real party in interest and authorized to prosecute the suit, are the following:

In *Lilly, et al.* v. *Tobbein, et al.,* 103 Mo. 477, 15 S.W. 618, 23 Am. St. Rep. 887, (Black, J., Div. 1), a decedent devised his property by will to an unincorporated church. After the death of deceased the church was incorporated and brought a suit to establish the will. The trial court rendered judgment probating the will, but on appeal the Supreme Court (82 Mo. 418) reversed the judgment, holding the corporation, when organized, was not vested with the property rights of the unincorporated Church society, and could not maintain the suit and ordered the cause dismissed. Then the unincorporated Society brought the suit as an unincorporated association to establish the same will. A demurrer was sustained on the ground the unincorporated Church society had no power or legal capacity to sue. The pleading was amended bringing in church members as trustees for the Church, and suing for themselves and all other members. The trial court rendered judgment establishing the will and ordering its Probate. The Estate appealed to the Supreme Court of

Missouri, and the Missouri Supreme Court said, 15 S.W. loc. cit. 620-621:

"5. Proceedings in the Circuit Court to contest or establish a will must be brought within five years after probate or rejection of the same. This suit was commenced in due time by the unincorporated church association, but the amended petition bringing in Lilly and others as plaintiffs was not filed until after the expiration of the five years. The question whether the amendment, when made, related back to the commencement of the suit so as to prevent a bar, is, of course, a different one from the right to make the amendment. *Buel* v. *Transfer Co.*, 45 Mo. 562, was a personal damage suit brought by the mother of the injured child. The cause of action was barred in one year. After the lapse of that time the plaintiff's divorced husband, who for some reason had been made a defendant, was made a co-plaintiff by amendment, and the question was whether that amendment related back to the commencement of the suit. The rule then laid down is to this effect: Where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point; but where the amendment introduces a new claim, not before asserted, then it is not treated as relating to the commencement of the suit, but as equivalent to a fresh suit upon a new cause of action, the running of the statute continuing down to the time the amendment is filed. Indeed, amendments may be allowed, rather than drive a party to a non-suit, for the very purpose of saving the cause from the statute of limitations. *Lottman* v. *Barnett*, 62 Mo. 159; *George* v. *Reed*, 101 Mass. 378. It is doubtless true, as many of the authorities cited hold, that an amendment bringing in a new party defendant will not relate back so as to prevent the bar of the statute as to the new party

defendant; but there is a vast difference between substituting a competent for an incompetent plaintiff, and bringing in a new defendant. Substituting the party having the legal right to sue for the claim for which the action was brought instead of another party improperly named as plaintiff is not the commencement of a new action, and in such a case the amendment relates back to the commencement of the action. *Insurance Co.* v. *Ludwig,* 108 Ill. 514. Now, in the present case there has been no change in the cause of action itself. The subject-matter of the suit and the issues to be tried were the same after as before the amendment. So far as the defendants are concerned, this suit was commenced when process was served upon them. The suit has been, from first to last, prosecuted in the interest of the church, and we entertain no doubt but the amendment substituting the individual plaintiffs for the unincorporated association related back to the commencement of the suit, and the statute of limitation was arrested at that time. But on behalf of some of the defendants it is argued that the proceeding up to the time the amendment was made was a nullity because prosecuted by a mere voluntary association, and for that reason the amendment was in effect the commencement of a new action. It is certain these defendants did not regard the suit as a void proceeding, for they appeared to the writ, stipulated for a change of venue, and pleaded to the petition. It would be going very far to say that a judgment establishing this will at the suit of the voluntary association would be a void judgment. We think such a judgment could not be successfully assailed in a collateral proceeding. On the conceded facts this will should have been probated at the outset, and the objections interposed by the defendants must be and are overruled. The judgment of the circuit court is therefore affirmed."

The above cited case is in point and directly rules the case at bar where the fourth amended petition was filed with leave by the revived corporation and the question presented is the same question whether the amendment was a departure and amounted to the institution of a new suit or whether it was an amendment of the same cause of action merely bringing into the case the real party in interest having the title and right to prosecute the same action already filed which stayed the running of the statute of limitations from the original filing of the action.

That is the very point presented in this proceeding, and that is exactly the question decided in *Lilly* v. *Tobbein, supra,* and would rule this case even if it were the only prior decision in point, but there are other cases to the same effect. The only distinction that could possibly be made is that in the case at bar the suit was pending a little longer time. No such distinction could be made for the reason that if the suit filed by the corporation after its charter has been forfeited, is effective to stay the limitation statute for a week then it is just as good for two weeks or any further length of time during which the suit is allowed to pend without abatement. There is no statute limiting the time and no court has power to enact a law or fix an arbitrary limit upon the time the suit could pend and stay the running of the limitation statutes in the absence of such a valid statute passed by the legislature.

The principle of law above announced in *Lilly* v. *Tobbein, supra,* has been reaffirmed and applied consistently and repeatedly in all the cases in Missouri where this point was raised.

In *Hutcherson* v. *Thompson,* 343 Mo. 884, 123 S.W. (2d) 142, the Missouri Supreme Court said, l. c. 148:

> "*Cytron* v. *St. Louis Transit Co.,* 205 Mo. 692, 104 S.W. 109, was an action under the wrongful death statute giving a cause of action to the father and mother jointly for the death of a minor child. The father alone sued. After the statutory limitation period had run an amended petition was filed making the mother a co-plaintiff. This court *en banc* held the amendment permissible. It said, 205 Mo. loc. cit. 700, 104 S.W. loc. cit. 111:
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> "'What is the proper judicial attitude toward amendments with reference to the Statute of Limitations?' As said in *Walker* v. *Railroad* (193 Mo. 453, 92 S.W. 83) *supra*: 'The answer, in the language of Napton, J. in *Lottman* v. *Barnett,* 62 Mo. (159) loc. cit. 170, is: "Amendments are allowed expressly to save the cause from the statute of limitations, and courts have been liberal in allowing them, when the cause of action is not totally different." The rule thus announced is steadily applied. (*Lilly* v. *Tobbein,* 103 Mo. (477) loc. cit. 490, 491, 15 S.W. 618, 23 Am. St. Rep. 887; *Courtney* v. *Blackwell,* 150 Mo. (425) loc. cit. 271, 272, 51 S.W. 668).'"
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> "Other authorities might be cited on the proposition that the original petition was subject to amendment even if it were held insufficient, but in view of our conclusion that it stated a cause of action we shall not lengthen this opinion by further discussion of said proposition. We have not considered whether or not it was subject to a timely motion to make more definite."

In *Hackett* v. *Van Frank,* 119 Mo. App. 648, 96 S.W. 247, the authorities are reviewed at length showing the right to amend and bring in the real party in interest as the plaintiff. This suit on a cause of action in favor of a corporation was brought in names of the owners of all the corporate stock. The corporation was the real party

in interest. If the action was abated it would be barred by the statute of limitations. The trial court refused to allow an amendment of the petition bringing in the real party in interest and the St. Louis Court of Appeals reversed the judgment, remanded the case with instructions to allow it. The court cited *Lilly* v. *Tobbein,* 103 Mo. 447, 15 S.W. 618, *supra,* and *Ward et al* v. *Pine,* 50 Mo. 38, where a suit was begun in name of a corporation of Illinois and plaintiffs were allowed to amend and bring in co-partners who were the real parties in interest. Here is another case in point where the action was barred by limitations unless an amendment is allowed, without departure, bringing in as plaintiff the real party in interest.

In *Turner* v. *Noble,* 249 S.W. 103, 211 Mo. App. 656, an original petition was filed by The Acme Cooperage Company, a corporation, as plaintiff, and an amended petition was filed making United States Cooperage Company, a corporation, the plaintiff. A second amended petition was filed substituting the plaintiff in original petition and then nearly 2 years after the suit was begun a third amended petition was filed substituting N. V. Turner as the plaintiff. The court cited *Lilly* v. *Tobbein, supra,* and quoted therefrom as follows:

> "Substituting the party having the legal right to sue for the claim for which the action was brought, instead of another party improperly named as plaintiff, is not the commencement of a new action."

Here is another case in point sustaining the right to amend without departure.

In *Enlinberg* v. *Quick Payment Old Line Lafe Ins. Co.,* 261 S.W. 725, the Court held an amendment substituting the Executrix of the insured in the place of the wife as the beneficiary under the policy was proper, although it

substituted a new party plaintiff. The court cited cases showing the real party in interest could be substituted as plaintiff.

In *Syz* v. *Milk Wagon Drivers Union,* (Mo. App.) 24 S.W. (2d) 1080, the Court allowed an amendment at the trial substituting the wife and children as plaintiffs instead of the administratrix.

In *Craig* v. *Metropolitan Life Ins. Co.,* 220 Mo. App. 931, 296 S.W. 209, an amendment was allowed at the trial after the evidence was in, substituting the insured's administrator as plaintiff in place of the mother of deceased who had no right of action.

In *Wilson Motor Co.* v. *Hoover,* 222 Mo. App. 570, 293 S.W. 61, the Kansas City Court of Appeals held (Syl. 2):

> "A petition in a damage suit by a dissolved corporation on a replevin bond may be amended in the names of its President and Board of Directors under Rev. St. 1919, Sec. 9755 and 9816, providing that such officers become trustees upon dissolution and are empowered to settle corporate affairs."

The case of *Lilly* v. *Tobbein, supra,* has been continuously cited and approved by the Missouri Supreme Court in its decisions and it has never been questioned at any time. In *Berger* v. *Meara,* 351 Mo. 64, 171 S.W. (2d) 650, the Supreme Court held a change in plaintiff's capacity from plaintiff as curatrix to plaintiff as administratrix *de bonis non* was permitted by the Court and the Court at the bottom of page 652, cites and approves *Lilly* v. *Tobbein, supra,* and gives a short summary of the holding therein.

The legal principle that the filing of a suit stays the operation of the statute of limitations from the filing of

the suit as to the cause of action pleaded in the petition and also as to any amended petition that can be filed without a departure is announced in *Thomas* v. *Finance Company* (Mo. App.) 180 S.W. (2d) 788; and in *Brinkmann Realty Co.* v. *Deidesheimer,* (Mo. App.) 201 S.W. (2d) 503, and in *St. Charles Bank* v. *Thompson,* 248 Mo. 72, 223 S.W. 734, l. c. 737, first paragraph (3).

The fact that the decision of the Missouri Supreme Court complained of herein, is contrary to the holdings of the common law courts in practically every state in the Union clearly appears from the following authorities where it is held that a suit filed by a corporation whose character has been forfeited does not abate if before any abatement is entered the corporation is restored and the forfeiture rescinded, to-wit:

J. B. Wolfe, Inc. v. *Salkind,* 70 Atl. (2d) 72, 76, 3 N.J. 312.

Dominion Oil Co. v. *Lamb* (Col. Sup. Ct. *en Banc*) (1949) 201 Pac. (2d) 372.

Jarvis v. *Chapman Properties, Inc.,* 147 So. 860, 110 Fla. 17.

Karnes v. *Flint,* 279 Pac. 728, 731, 153 Wash. 225.

Watts v. *Liberty Royalties Corp.,* 106 Fed. (2d) 941, 943, (C.C.A. Okla.).

Ferguson Fruit Co. v. *Gooding,* 258 Pac. 557, 559, 44 Idaho 76.

Beller and Campbell Supply Co. v. *Warren,* 100 Pac. (2d) 700, 157 Kans. 755.

Mass. Lubricant Corp. v. *Socony-Vacuum Oil Co.,* 25 N.E. (2d) 719, 305 Mass. 269.

McKee v. *Standard Minerals Corp.,* 156 At. 193, 18 Del. Ch. 97.

Federal Crude Oil Co. v. *Yount-Lee Oil Co.,* 52 S.W. 2d 56, 61, 122 Tex. 21.

Real Estate Land Title and Trust Co. v. *Dildy,* (Tex. Civ. App.) 92 S.W. (2d) 318, 322.

McClung v. *Hill,* 96 Fed. (2d) 236 (1).

Hall v. *Citizens Bank* (Cal.) 128 Pac. (2d) 545, (Syl. 1).

Kehrlein-Swinerton Const. Co. v. *Rapken,* 30 Cal. App. 11, 156 Pac. 972.

Maryland Cas. Co. v. *Superior Court of San Francisco,* 91 Cal. App. 356, 267 Pac. 169.

Each of the foregoing cases are directly in point for the reason that if the suit filed by the corporation after its charter is forfeited is sufficient as a suit to bring the defendants into court and constitute a valid pending cause of action upon the setting aside of the forfeiture then the length of time the suit is allowed to pend without an abatement could have no effect whatever to end or terminate the pendency of the suit as a valid cause of action prior to its actual abatement for the reason that if the action is a good action while the forfeiture is in effect a year then it would be a good action until the corporate charter is restored after the lapse of any further or extended period. What sound reason or cause could operate to make the pending suit filed after the plaintiff's charter has been forfeited, a good pending suit for a few years, but not a good pending suit for a little more time? The statute places no limit to the time within which the corporation may have the forfeiture of its charter set aside or rescinded and its corporate charter restored by paying all taxes and penalties, and the cases cited in other states are authorities in point upon the question presented here.

The fact that these cases are not Missouri cases may be claimed to make them inapplicable, but the Missouri

Supreme Court undertook to cite some authority somewhere to support their opinion and it went to California and cited *Cleveland* v. *Gore Bros.*, 58 Pac. (2d) 931. The question decided in that case was an entirely different question. In that case the suit was not filed by a corporation whose charter had been forfeited. The suit was brought by an assignee who had purchased the claim sued on, from a corporation after the corporation's charter had been forfeited. On the date of the assignment the corporation had no title and only the statutory trustees could make a valid assignment of its property. The assignee who filed the suit could not show title to the claim. The corporation which had assigned the claim sued on was afterwards reinstated as a corporation and its corporate powers were restored but this could not give validity to an assignment of its property made by the defunct corporation while its charter was forfeited and not made by the statutory trustees who then had the title.

In Missouri, as well as in California, and other jurisdictions, a corporation whose charter has been forfeited is without title or power to assign its property and any such conveyance is void. *Bradley* v. *Rippell,* 133 Mo. 545, 32 S.W. 645; affirmed *en banc,* 135 Mo. 545, 34 S. W. 841.

In the California case cited by the Missouri Supreme Court as an authority in point, the assignee filing the suit had no title, the corporation making the assignment never appeared or never asked leave to intervene and the real party in interest was never in the case. The case could not possibly be an authority on the question whether the petition could be amended without a departure bringing in the real party in interest.

The following cases show conclusively that the law in California is the same as the law in Missouri, to the effect that in a suit brought by or in the name of a corporation, after its charter was forfeited, an amendment can be made, without a departure, substituting the real party in interest authorized to sue on the claim, towit:

Hall v. *Citizens Bank,* (Cal.) 128 Pac. (2d) 545, Syl. 1.

Kehrlein-Swinerton Const. Co. v. *Rapken,* 30 Cal. App. 11, 156 Pac. 972.

Maryland Casualty Co. v. *Superior Court of San Francisco,* 91 Cal. App. 356, 267 Pac. 169.

The decision complained of herein is contrary to all the decisions of the Missouri courts involving the bar of actions for damages for conspiracy wherein it is uniformly held that such action is never barred until the lapse of the statutory period after the last overt act of the conspirators. The fourth amended petition alleges overt acts just committed and the opinion holding said action barred is contrary to the following cases where the suit was brought many years after the damage occurred:

State v. *American Ins. Co.,* 200 S.W. (2d) l. c. 43, 355 Mo. 1053.

State v. *Arkansas Lumber Co.,* 169 S.W. 145, 260 Mo. 212.

The Missouri Supreme Court was unable to cite any case in point from any jurisdiction anywhere to sustain their impossible and unheard of ruling in the case at bar. The decision is impossible because the real party in interest filed the fourth amended petition and no abatement could then be had.

We submit that an arbitrary decision contrary to all the established law does not afford petitioner due process

of law or the equal protection of the law guaranteed by Section 1 of the Fourteenth Amendment.

(2) The decision of the Missouri Supreme Court, complained of herein, is arbitrary and denies petitioner due process of law because the said opinion is contrary to and in violation of a valid statute of the State of Missouri, to-wit: Section 4621 R. S. Mo. 1929, now Section 351.540, R. S. Mo. 1949. This Section reads as follows:

> "The secretary of state may rescind the forfeiture of the corporate rights of any corporation, declared under the provisions of this article, upon presentation of an affidavit signed by the president, or secretary, of such corporation, setting forth that such corporation has not suspended its ordinary and lawful business within one year next before the filing of such affidavit, or that the corporation at the time of the forfeiture was declared held title, or transferable interest, in real estate. The secretary of state may demand such other and further proof as he may deem necessary before rescinding any such forfeiture. For rescinding such forfeiture there shall be paid to the state a fee of fifty dollars; provided, no such forfeiture shall be rescinded after one year from the date of its entry for less than the fees required by law for original corporation. (R. S. 1919, Sec. 9815.)"

Section 4619, R. S. Mo. 1929, authorized the Secretary of State to forfeit the Charter of any Corporation for failure to comply with the provisions of said Statutes within the time therein provided. This is the statute under which plaintiff's charter was forfeited and it was enacted in 1919. (Laws 1919, page 230). The origin of this act shows it was amended after it was first introduced in the legislature by adding the words, "subject to rescission as in this act provided", at two places in the act.

Section 4621, *supra,* also enacted in 1919, authorized the Secretary of State to "Rescind" the forfeiture upon payment of the required fee. The legislature used the word "rescind". That word has an established and commonly understood meaning defined in current dictionaries and numerous court decisions and the legislature must be understood to have intended to use that word in its generally accepted meaning. Giving that word its commonly understood meaning, the rescinding of the forfeiture extinguished and obliterated the forfeiture as effectively as if it had never been made and automatically restored the corporation *ab initio* to the same position it was in prior to the forfeiture. It wiped out the dissolution completely.

The following authorities show that this meaning of the word "rescind" is the accepted legal meaning intended by the legislature in said statute:

In *Henges Co.* v. *May* (Mo. App.), 223 S.W. (2d) 110, the Court says (Syl. 6):

> "Rescission of a contract extinguishes it as effectually as if it had never been made and restores the parties to positions they occupied before contract was executed and to their original rights with respect to the subject matter and they are no longer bound by contract in regard to subsequent actions."

In *Kurth* v. *Morgan,* 277 S.W. 50, an opinion by Judge, says:

> "(7, 8) The general rule is that, 'when contracts are rescinded the parties should be restored to their former rights, and placed in the same situation in which they stood previous to the agreement * * *.'"

In 12 Am. Jur., page 1038, Sec. 455 (14, 15) it is said:

> "Sec. 455. Effect of rescission. Generally speaking, the effect of rescission is to extinguish the con-

tract. The contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken. Accordingly, it has been said that a lawful rescission of an agreement puts an end to it for all purposes, not only to preclude the recovery of the contract price, but also to prevent the recovery of damages for breach of the contract. The effect of a rescission of an agreement is to put the parties back in the same position they were in prior to the making of the contract."

In *Sylvania Industrial Corp.* v. *Lillienfelds Estate,* (C.C.A. (Va.)), 132 Fed. (2d) 887, 892, 145 A.L.R. 612, it is said:

"To 'rescind' a contract is not merely to terminate it but to abrogate and undo it from the *beginning,* that is, to restore the parties to their previous relative positions." (Italics ours.)

In *Vincent* v. *Palmer,* 19 At. (2d) 183, 187 (Syl. 11), 179 Md. 365; and *Reed* v. *McLaws,* 110 Pac. (2d) 222, 225, 556 Ariz. 556, it is said:

"To 'rescind' contract is not merely to terminate it, but to abrogate it *ab initio.*"

In *Friedman* v. *Kennedy,* D. C. Mun. App. 40 At. (2d) 72, 74, (Syl. 2), it is said:

"To 'rescind' means to annul; to put an end to as though it never existed; to wipe out an instrument."

The Court in its opinion, said:

"To 'rescind' a contract is not merely to terminate it, but to abrogate and undo it from the beginning; not merely to release the parties from further obligation to each other in respect to the subject of contract, but to annul the contract and restore parties to relative positions which they would have occupied if no such contract had ever been made."

In *F. & M. Drilling Co.* v. *M. & T. Oil Co.,* (Syl. 2), 137 Pac. (2d) 575, 577, 192 Okla. 372, it is said:

"'Rescission', means to restore the parties to their former position."

In *Funk* v. *Baird,* 6 N.W. (2d) 569, 574 (Syl. 3), 72 N.D. 298, it is said:

"'Rescission' restores parties to relative positions which they would have occupied if no contract had been made."

In *Reed* v. *McLaws,* 110 Pac. (2d) 222, 225 (Syl. 6), 56 Ariz. 566, it is said:

"'Rescission' involves the additional and distinguishable element of a restoration of the status quo."

Webster's New International Dictionary, Second Edition (1949) contains the following definition of "Rescission":

"Act of rescinding abrogating, annulling, or vacating." And of "Rescind":

"Specif.: To vacate or make void, as an act, by the enacting authority or by superior authority; to repeal; as, to rescind a law, a resolution, or a vote; to rescind a decree or a judgment. In the law of contracts the technical rescinding of a contract avoids the contract *ab initio* and requires that both parties be put as far as possible in the same position as before making the contract."

In 54 C. J. 694 "Rescind" is defined as follows:

"The act of abrogating, canceling, vacating, or annuling; the undoing of a thing; and has been distinguished from 'abandonment,' 'cancellation,' 'determination,' 'modification,' 'reformation,' 'repudiation,' and 'termination.'"

In *McClung* v. *Hill,* 96 Fed. (2d) 236, Syl. (1), it is said:

"Statutes which provide for forfeiture of corporate charter, and also for its rescission with restoration

> of the corporate life, are valid, and, when complied with, restore corporation as though it had never been dissolved."

The Missouri statute is plain and unambiguous and it means what it says. The statute does not authorize the Secretary of State to merely set aside the forfeiture, it authorizes him to rescind the forfeiture that means to abrogate, annul, and make void the forfeiture as if it had never been. A state court decision contrary to a valid existing statute of the State is not due process of law. It is a stark denial of a statutory legal right and that certainly is not due process of law.

(3) The decision of the Missouri Supreme Court complained of herein, is arbitrary distinguishes between litigants and denies petitioner due process of law because the said opinion is contrary to a valid statute of the State of Missouri, to-wit: Section 4629, R. S. Mo. 1929 (now Section 351.535 R. S. Mo. 1949), and amounts to a judicial enactment of a statute in conflict with said valid statute enacted by the Missouri legislature.

Section 4629 R. S. Mo. 1929, reads as follows:

> "No corporation shall maintain an action in any court of this state for the collection of bills or accounts payable or for the enforcement of a contract, made while such corporation is in suspension, or after the forfeiture of its certificate, or license, under the provisions of this article, unless it shall have first been reinstated, or the forfeiture entered against it rescinded as in this article provided."

There are several reasons why this statute does not apply to this case. (1) This is not an action for the collection of a bill or account or for the enforcement of a contract made while the corporation was in "temporary cessation" during the interim between forfeiture and

rescission. (2) It is an action in damages for unlawful conspiracy by which plaintiff was defrauded of its building fund and property. (3) The contracts which gave opportunity for the fraudulent conduct of respondents were entered into before forfeiture of the charter.

When the legislature framed this prohibitory statute it specifically limited the prohibition to actions on bills, accounts and contracts. It would not have used such language if the intention to prohibit tort actions was in contemplation.

In Section 351.635 R. S. Mo. 1949 (1919 R. S. 9793) (1929 R. S. 4599), the legislature in a similar regulatory statute against foreign corporations *included* in its prohibition, *tort* actions. That statute is however expressly confined to *foreign* corporations. The reason that the legislature had for including tort actions in one Act and excluding it in the other Act is purely personal to the legislature. That is the peculiar prerogative of law making bodies. We quote this Foreign Corporation Statute as follows, as it existed when this suit was filed (1929 R. S. 4599) (1919 R. S. 9793):

> "* * * No foreign corporation as above defined, which shall fail to comply with said section can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of the contract or tort." * * *

These two statutes are radically different. The two may not be given the same construction. Surely the language of the legislature must be given effect according to its plain meaning. It certainly evinces an intent not to prohibit the filing of tort actions by domestic corporations referred to in the order of forfeiture. (T. 33, 34). It was said by the Court in the *Collier case,* discussing these sections (256 S.W. 118, 119, 215 Mo. A. 182):

> "* * * Manifestly, it provides a vastly different penalty and result from that prescribed in section 9793, R. S. 1919, (4997.110 *supra*) for failure to first obtain a license, namely, forbidding the maintenance of 'any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of the contract or tort.'"

The established rule applicable to the construction of statutes is embodied in the maxim, "*expressio unius est exclusio alterius*", meaning the expression of one thing is the exclusion of another, 59 C. J. Sec. 582, page 984, and this is the established rule in Missouri. *State* v. *Sweaney,* 270 Mo. 685, 195 S. W. 714.

To expressly prohibit an action on contract impliedly excludes tort actions from the operation of the statute. To make the statute apply to tort actions not referred to in the statute amounts to judicial legislation contrary to a valid act of the legislature.

(4) The opinion of the Missouri Supreme Court complained of herein, is arbitrary and denies petitioner due process of law because the said decision is contrary to the established law and controlling decisions in Missouri holding that the existence of a private corporation duly chartered and recognized by the state as such, is not subject to attack by private litigants, but can only be inquired into by the State in a direct proceeding, and is not subject to collateral attack either by the state or private litigants.

This is the established law of Missouri and a few of the controlling decisions are as follows:

Pearson Drainage District v. *Erhardt,* 201 S. W. (2d) 484, 239 Mo. App. 845.

Mendenhall v. *Booher,* 48 S. W. (2d) 120.

Evangelical Lutheran Synod, etc. v. *Hoehn,* 196 S. W. (2d) 134, 355 Mo. 257.
Gray v. *School District,* 28 S. W. (2d) 683, 224 Mo. App. 905, and cases cited.
School District v. *Wilson,* 135 S. W. (2d) 349 (12), 345 Mo. 598.
Laird v. *Pan American Lumber Co.,* (Mo. App.) 237 S. W. 1047.

At the time petitioner's existence as a corporation was collaterally attacked by defendants in September 1950, the corporation had been on January 17, 1946, restored in good standing and no sound reason can be given why said defendants could collaterally attack its corporate existence in September 1950. When the Secretary of State of Missouri issued and delivered to petitioner, January 17, 1946, his certificate rescinding the forfeiture, it vested petitioner with continued existence from the date of its original incorporation, and validated all its corporate acts as a corporation from the date of its charter and under the established law of Missouri no private litigant could, after January 17, 1946, attack its corporate existence, in other words no private litigant would be allowed in any case to attack its corporate existence.

Laird v. *Pan American Co.,* (Mo. App.) 237 S. W. 1047, involved two of the original defendants herein, Roscoe Reyburn, (now deceased) and the Commerce Trust Company. The defendant Pan American Lumber Co., a Missouri corporation, in which Mr. Reyburn was a stockholder, floated a first mortgage bond issue of $750,000.00 in 1918, and a second mortgage bond issue of $110,000.00. The Commerce Trust Company was trustee. The Pan American Lumber Company soon found itself without available funds, and like the plaintiff herein, suf-

fered a forfeiture of its charter for failure to comply with statutory regulations. This was January 1, 1920.

When a receiver took over, he applied for and obtained a rescission of the order of forfeiture. Mr. Reyburn and his fellow stockholders appealed from a judgment of $5000.00 allowed the receiver for his services and, as in the instant case, launched a collateral attack on the order of rescission as follows:

> * * *" the receiver was not authorized by the statute to reinstate the company; that it was not reinstated at the time the additional defendants were ordered brought in, and that the cause had abated at that time, and at the time the trial was had and judgment rendered, and that no effort was made to bring the corporate defendant into court by proper summons after the forfeiture had been set aside by the action of the receiver if he had the power to have the same set aside."

In denying the soundness of such contention, the court said:

> "(1) We find nothing in this contention. The matter of the forfeiture of the corporate rights of the corporation by virtue of the statute we have cited *supra* is one between the state and the corporation, and the parties to this suit could not successfully attack the existence of the corporation either in the trial court or here." (Citing cases)

It was for the State to say whether or not rescission should be granted, and after having been granted, it certainly was not within the power or privilege of any private suitor to annex conditions and whittle down the effect of the State's order. Besides, rescission operates only on the immediate parties to it.

The filing by defendants of general demurrers (Tr. 89), motions for costs (Tr. 84), answers denying generally the

plaintiff's petition (Tr. 78, 80), motions to make petitions more definite and certain (Tr. 85), all admitted the existence in court of plaintiff's action and completely waived want of capacity of plaintiff to sue. It is a well settled rule of the common law that where a party, by his act, either by deed or *in pais*, admits a fact to be true, he is not permitted to contradict it.

14 C. J. Sec. 277, p. 248.

Rialto Co. v. *Miner*, 183 Mo. App. 119, 166 S. W. 629, (Syl. 8).

K.C. Y.M.C.A. v. *Dubach*, 82 Mo. 475.

Pullman v. *Upton*, 96 U. S. 328, 25 L. Ed. 818.

In the case at bar defendants had secured a judgment against plaintiff corporation after its charter was forfeited, (Tr. 23, 12, 14) and on that judgment had foreclosed plaintiff's property December 18, 1930, (Tr. 12, 17). While its charter was forfeited, and the foregoing authorities are conclusive that this operates as a complete estoppel.

A fairly recent case is that of *Pearson Drainage Dist.* v. *Erhardt*, 201 S. W. (2d) 484, wherein certain irregularities in the organization of the Drainage District was collaterally attacked by the defendant. Said the Court:

> * * *"If all these elements are present, such a corporation has corporate existence even as against the state on collateral attack, and as against individuals and other corporations whether its right to corporate existence is attacked collaterally or directly. *School Dist. No.* 35 v. *Hodgin*, 180 Mo. 70, 79 S. W. 148; *Boatmen's Bank* v. *Gillespie*, 209 Mo. 217, 108 S. W. 74; 18 C. J. S., Corporations, sec. 94; 13 Am. Jur., Corporations, sec. 60.
>
> (5) The theory is that since the state alone has the power to incorporate, it may waive irregularities

> in the strict perfection of corporate existence; and so long as the state does not see fit to question the legality of the existence of a corporation, private individuals will not be permitted to raise an inquiry on their own behalf. 18 C. J. S. Corporations, sec. 84; 13 Am. Jur., Corporations, sec. 61." (l. c. 488, 489)

The defendants in their motions filed in 1950 are making a mass attack upon the existence of plaintiff, and thereby, they are usurping a governmental function. They have no legal or just claim to exemption from liability for the wrongs alleged in the petition. The specter of forfeiture that has haunted the plaintiff through the years of impoverishment is of the defendants' creation (Tr. 18, Par. 15).

The allegations of the petition, which are admitted by the several motions of defendants, disclose that $626,-098.00 in cash and bonds belonging to plaintiff's construction fund was paid by one defendant to another without taking receipts or lien waivers, a large portion of which fund was misappropriated instead of being paid to the mechanics and material men. As a direct result lien judgments were obtained, thereby precipitating a judicial sale of plaintiff's property. (Tr. 8 to 16), (Par. 12, Fourth to Seventh) Forfeiture of Charter was the direct result of the ensuing financial distress of plaintiff.

The Supreme Court of Missouri in rendering the decision complained of herein, ignored and violated the established law of Missouri in all the four particulars aforesaid, any one of which would have reversed the decision.

We respectfully submit that upon no sound legal theory can the decision be sustained as due process of law.

CONCLUSION.

The most vital and essential element of freedom is equal and exact justice in the courts. The uniformity of decision in all cases, which accords to all citizens the same treatment in the Courts and the determination of their rights by the established rules of law and not by the arbitrary decree of any tribunal is obviously the enlightened and benign aim and purpose of the adoption of the Fourteenth Amendment. Are we to learn now that this purpose has not been attained by its enactment. Of this we can be sure that we can have no government worthy of the name if equal and exact justice is not enforced in the courts. When the integrity of the courts is lost we have no government left. If the security of the lives and property of our people is no longer governed by uniform and established law, but is subject to arbitrary denial by courts having the power to change the established law at their pleasure and to decide cases as they please, giving judgment in one case according to the established law, and arbitrarily decide another case exactly like it another way, against the established law, then in the place of law, we have enthroned arbitrary power as the final arbiter instead of fixed and established rules of law. We submit that a wise and judicious enforcement of the Fourteenth Amendment in the enlightened spirit of its enactment will surely prohibit the arbitrary denial to a litigant of justice in the Courts to which he is entitled under the established law. An arbitrary decision contrary to the established law cannot be due process of law. We think petitioner is entitled to the Writ herein. In *Cohens* v. *Virginia,* 6 Wheat. 264, l. c. 404, 5 L. Ed. 257 l. c. 291, this court said:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurdisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

Petitioner brings before this court the opinion of the Missouri Supreme Court complained of herein with the constitutional question properly raised in the case and petitioner's claim now before this court is that petitioner has been denied a remedy to which he is entitled under the established law of Missouri by a decision of the Missouri Supreme Court, without a single precedent to sustain it, and which is contrary to all the controlling decisions of the Missouri courts in point, contrary to valid statutes of the state and amounts to an arbitrary denial of due process of law to petitioner guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution.

We submit that under the decision of this Court in *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281

U. S. 673, 50 Sup. Ct. 451, 74 Law Ed. 1107, it becomes the duty of this court, under said constitutional provision, to pass upon and decide whether petitioner is entitled to a fair and impartial trial, before a jury, of his grievances. If under the established law of the land petitioner is entitled to a fair trial on the merits then the arbitrary dismissal of this cause is a denial of due process of law. A fair trial can injure no one. A fair trial on the merits is the consummation of justice in every case. To this petitioner is entitled under the established law of the land. The arbitrary denial of this, contrary to the established law of the land, is a denial of due process of law contrary to Section 1 of the Fourteenth Amendment, no matter what motive, cause or excuse has prompted such arbitrary denial.

Respectfully submitted,

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